Sateras Resources (M) Bhd (formerly known as Synthetic Resins (M) Bhd) v Pengurusan Danaharta Nasional Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–81 OF 2007
JAMES FOONG, HELILIAH AND SULONG MATJERAIE JJCA
17 DECEMBER 2008

Companies and Corporations — Winding up — Appeal against winding up — Petition for winding up against appellant after similar petition against joint contractor — Whether appellant and joint contractor discharged accrued liability — Whether petition constituted abuse of process

The first respondent in this appeal had obtained a summary judgment against the appellant and one Cosmopac Sdn Bhd ('Cosmopac') for the amount of RM46,500,000. When the appellant failed to satisfy the judgment sum, the first respondent issued a statutory demand for payment of the judgment debt by leaving the same at the appellant's registered office. When no response was forthcoming from the appellant, the first respondent issued a winding up petition against the appellant. The High Court duly granted a winding up order against the appellant. This was the appellant's appeal against the High Court decision allowing the winding up. The appellant contended that since the first respondent had elected to recover the same judgment sum from Cosmopac it was consequently barred from filing a similar claim against the appellant. The only issue before the court in this case was the question of law as to whether the first respondent having already instituted a petition for winding up against Cosmopac was barred from instituting a similar petition against the appellant.

Held, dismissing the appeal with costs:

In this appeal the summary judgment was obtained against both the appellant and Cosmopac in the one and the same action and that final judgment remained uncontested. The first respondent now sought a fruition of the judgment and therefore the filing of the petitions for winding up constituted a different cause of action based on a judgment debt. Since both the appellant and Cosmopac had not discharged the accrued liability under the same judgment the first respondent was not precluded from seeking recourse in a statutory mechanism provided under s 218(1)(e) of the Companies Act 1965.

Further, in the circumstances of the case, the 'technical rule' that where there were joint contractors if judgment was signed against one the other was discharged did not warrant the first respondent from being prejudiced from realising the judgment debt. Thus, the action on the unsatisfied judgment against Cosmopac could not operate as an extinguishment of the debt for as long as it remained unsatisfied. There was also here no abuse of process for it was indeed proven that the appellant had not been able to establish that it was not unable to pay its debts (see para 12); *Parr v Snell & Ors* [1923] 1 KBD 1 , *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741 and *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451 distinguished.

[Bahasa Malaysia summary

Responden pertama di dalam rayuan ini telah memperoleh penghakiman terus terhadap perayu dan Cosmopac Sdn Bhd (Cosmopac) bagi jumlah sebanyak RM46,500,000. Apabila perayu gagal untuk menyelesaikan jumlah penghakiman, responden pertama mengeluarkan tuntutan statutori untuk pembayaran hutang penghakiman dengan meletakkannya di pejabat berdaftar perayu. Apabila tiada jawapan daripada perayu, responden pertama mengeluarkan petisyen penggulungan terhadap perayu. Mahkamah Tinggi dengan sewajarnya membenarkan perintah penggulungan terhadap perayu. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi membenarkan penggulungan tersebut. Perayu menghujah bahawa oleh sebab defendan pertama telah memilih untuk mendapatkan semula jumlah penghakiman tersebut daripada Cosmopac ia oleh yang demikian dihalang daripada memfailkan tuntutan yang serupa terhadap perayu. Satu-satunya isu di hadapan mahkamah di dalam kes ini adalah persoalan undang-undang sama ada responden pertama setelah memulakan petisyen untuk penggulungan terhadap Cosmopac adalah dihalang daripada memulakan petisyen yang serupa terhadap perayu.

Diputuskan, menolak rayuan dengan kos:

Di dalam rayuan ini penghakiman terus telah diperoleh terhadap kedua-dua perayu dan Cosmopac di dalam tindakan yang sama dan penghakiman muktamad masih tidak dicabar. Responden pertama kini cuba untuk melaksanakan penghakiman tersebut dan oleh itu pemfailan petisyen penggulungan merupakan kausa tindakan yang berbeza berdasarkan hutang penghakiman. Oleh sebab kedua-dua perayu dan Comopac tidak melepaskan liabiliti terakru di bawah penghakiman yang sama responden pertama tidak dihalang daripada menyandar pada mekanisme statutori yang diperuntukkan di bawah s 218(1)(e) Akta Syarikat 1965. Selanjutnya dalam keadaan kes

tersebut, 'kaedah teknikal' bahawa di mana terdapat kontraktor bersama jika penghakiman ditandatangani terhadap satu, yang satu lagi dilepaskan, tidak mewajarkan responden pertama daripada diprejudis daripada mendapatkan hutang penghakiman. Oleh itu tindakan terhadap penghakiman yang tidak dipenuhi terhadap Cosmopac tidak boleh beroperasi untuk melenyapkan hutang selagi ia masih tidak diselesaikan. Di sini juga tidak ada penyalahgunaan proses kerana ia sememangnya telah dibuktikan bahawa perayu tidak boleh membuktikan bahawa ia tidak boleh membayar hutang-hutangnya (lihat perenggan 12): *Parr v Snell & Ors* [1923] 1 KBD 1, ; *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741 dan *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451 (dibezakan).]

Notes

For cases on appeal against winding up, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 992–994.

Cases referred to

Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor [2006] 4 MLJ 451; [2006] 2 CLJ 723, HC (distd)

Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors [2002] 2 CLJ 741, HC (distd)

Hammond v Schofield [1891] 1 QB 453, DC (distd)

Hoare v Niblett [1891] 1 QB 781, DC (distd)

Parr v Snell & Ors [1923] 1 KBD 1, CA (distd)

Wegg Prosser v Evans [1895] 1 QB 108, CA (refd)

Legislation referred to

Companies Act 1965 s 218, 218(1)(e)

Rules of the High Court 1980 O 14

SN Seelan (Mahathir Abdullah and WW Wong with him) (Athi Seelan) for the appellant.

Azhar Azizan Harun (HY Peh, Hazlina Hussain, Normareza Mat Rejab, K Ganesan, Daya Nair, Eric Clement, Teh Meng Teck and Puteri Shelinaz Majid with him) (Cheang & Ariff) for the respondents.

Heliliah JCA (delivering judgment of the court):

[1] There were two appeals fixed for hearing namely: (a) Civil Appeal No W-02–81 of 2007; and (b) Civil Appeal No W-02–214 of 2007. Appeal (a) was lodged against the decision of the learned High Court judge dated 2 January 2007 in allowing the winding up petition dated 6 October 2006.

Appeal (b) constitutes an appeal against the decision of the same judge dated 25 January 2007 in dismissing the appellant's summons in chambers dated 19 January 2007 to stay the winding up proceedings.

[2] In both these appeals, the appellant was the respondent in the petition for winding up whilst the first respondent was the petitioner. In respect of appeal (b) this has been rendered academic since decision was given by the High Court judge in favour of the petitioner/first respondent. At the instance of the learned counsel for the appellant appeal (b) was withdrawn with all learned counsels for the respondents not opposing the application. Appeal (b) is consequently struck off with costs to all the respondents with the deposit to the respondents to account of taxed costs.

[3] We then proceeded to deal with appeal (a). The petition for winding up filed by the respondent in appeal (a) was grounded upon a summary judgment obtained by the first respondent against the appellant for the amount of RM46,500,000 ('the judgment'). The judgment dated 10 October 2000 was obtained pursuant to O 14 of the Rules of the High Court 1980 and made against Cosmopac Sdn Bhd ('Cosmopac') and the appellant in this appeal as defendants vide High Court Suit No D5–22–115 of 1998. The appellant failed to satisfy the judgment.

[4] On 31 May 2006 the first respondent left a notice of demand dated the same day at the registered office of the appellant pursuant to s 218 of the Companies Act 1965 (the statutory demand pursuant to s 218 for payment of a debt). No response was made by the appellant. On 6 October 2006 the first respondent instituted a winding up petition against the appellant and on 25 January 2007 a winding up order was granted against the appellant.

[5] In the absence of the written grounds of judgment of the trial court, all parties by consent have agreed for this court to proceed to deal with this appeal. It is not in dispute that no appeal was lodged against the judgment and neither was there an application for stay of execution of the judgment. In the written submission tendered before this court the judgment has been referred to as a judgment in default. The record of appeal clearly shows that the judgment of 10 October 2000 was a summary judgment obtained pursuant to O 14 of the Rules of the High Court 1980.

[6] It is found that there is only one central issue raised by the appellant. The grievance of the appellant is that the petition for winding up filed against that is grounded upon the judgment dated 10 October 2000 has established a joint liability not only against the appellant but also against another company, Cosmopac.

[7] The first respondent in this appeal has presented a similar winding up petition vide Kuala Lumpur High Court Winding Up Petition No D8–28–683 of 2006 against Cosmopac. It is the contention of the appellant that by doing so the respondent has elected to recover the same judgment sum from Cosmopac and is consequently barred from filing a similar claim against the appellant.

[8] Before proceeding with this issue, it is evident that the appellant has not been able to refute the respondent's claim in instituting a petition for winding up on the ground of the appellant's inability to settle the judgment debt. There appears to be no valid basis in the affidavit filed in opposition to dispute the first respondent's claim. Whatever reliance placed on the contents of the affidavits filed in respect of the action for stay of the petition for winding up is now rendered otiose with the withdrawal of the appeal (b), ie W-02–214 of 2007. There remains only one issue which is a question of law: whether the first respondent having already instituted a petition for winding up against Cosmopac is barred from instituting a similar one against the appellant. This submission of the appellant is postulated on the decision made in *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741. This decision in turn appeared to have evolved solely on the English decision of *Parr v Snell & Ors* [1923] 1 KBD 1. Also cited by counsel for appellant were *Hammond v Schofield* [1891] 1 QB 453 and *Hoare v Niblett* [1891] 1 QB 781. The proposition stated in *Asia Commercial Finance* extracted from *Parr v Snell* is as follows:

> *Parr v Snell & Ors* [1923] 1 KBD 1 was an action against three joint contractors, for damages for breach of an agreement. The plaintiff obtained an interlocutory judgment for damages, to be assessed, against two of the defendants in default of defence. He then procured an assessment of damages and signed final judgment for the assessed amount against the two defendants who were in default. The court held that apart from any rules of court or any statutory provisions to the contrary, judgment against one joint contractor or tortfeasor is a bar to proceedings against the others. Putting it in another way what it means is that where there are joint tortfeasors and if final judgment is signed against one, the other is discharged. Scrutton LJ went on to say at p 9 'that the contract is merged in the judgment, and therefore the cause of action on the contract is gone'. The issue is to determine whether it was a joint contract. In this case since the second to the fourth defendants signed the same guarantee there can be no dispute that it was a joint contract. In fact the plaintiff relies on such a plea when it pleaded that the defendants 'jointly and severally' agreed to repay on demand. The rationale is this. Each joint contractor has a right to have his co-contractors joined as parties so that all parties can be before the court. I agree with the view expressed in *Parr v Snell*. Since final judgment has been entered against the third and fourth defendants the second defendant's contract has merged in the judgment entered against the third and fourth defendants and there is now therefore no cause of action against the second defendant remaining. I therefore struck out the suit against the second defendant with costs.

[9] Despite this reliance on the above proposition we are of the view that there is still a need to revisit *Parr v Snell* as was done in *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451; [2006] 2 CLJ 723. In this latter case Ramly Ali J re-examined *Parr v Snell* and noted the following:

> It must be noted that the Court of Appeal in that case had made a finding of facts that the relevant contract entered into by the plaintiff and all the three defendants was a joint contract, after taking into consideration the nature of the undertaking given by all of them to the plaintiff. The undertaking in that case is not for payment of liquidated amount, as in the present case. The undertaking in that case is to find a purchaser to purchase the plaintiff's shares upon his relinquishing his post as secretary of company. There is no indication or evidence at all to show that the undertaking was given on a 'joint and several' basis, as in our present action. Scrutton LJ provided exception to the rule ie, 'unless there is some rule or statute which prevents the operation of the old rule'.
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> One of the rules cited by the learned judge is 'Order XIII — relating to judgment signed in default of appearance', where it was held:
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> > In Order XIII and in Order XXVII if it is a case of a debt or liquidated demand, judgment may be signed against one for default of appearance of default of pleading, and yet the plaintiff may go on and sign judgment against the others.
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> It is also to be noted that the so a called 'old rule' (as described by Scrutton LJ) still survives (in that case) as to 'that class of case' ie, for action for damages or unliquidated demand where the plaintiff is not allowed to sign final judgment against some of the defendants and yet go on against the others or other. Therefore, in that case (*Parr v Snell*) the Court of Appeal had rightly held that since the plaintiff's claim was not a liquidated claim (but for damages or unliquidated claim) the plaintiff cannot proceed against the remaining third defendant after final judgment had been entered against the other two defendants. In that case, the Court of Appeal was satisfied that there was no 'rule of statute' which present the operation of the 'old rule'.
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> From the above principles, the court understands that the said 'old rule' is applicable only in cases where the contract is not at 'joint contract'. It is not applicable in cases where the contract is based on 'joint and several' liability. The said rule is also not applicable if 'there is some rule or statute which prevent it's operation'. This court is also of the view that the said 'old rule' does not apply if there are agreements between the parties to exclude its operation in a particular case'.

[10] Apart from the point that Ramly Ali J had distinguished, *Parr v Snell* on facts, it would still be useful to advert to the precise statement of Scrutton LJ to appreciate his finding as follows:

We are dealing with a settled system of law and are not entitled to mould or disregard it, because, as I think in this case, the rule is a technical one *which does not in any way affect the merits of the particular case*. The technical rule of law which we have *to apply is this: that where there are joint contractors if judgment is signed against one the other is discharged*. I have recently had occasion to deal with that rule in *Moore v Flanagan* (1), where I said, and I think rightly, that the basis of the rule is, as stated by Vaughan Williams J in *Hammond v Schofield* (2): '*The basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract.*' I then went on to say (3): 'Another technical way of putting it is to say *that the contract is merged in the judgment, and therefore the cause of action on the contract is gone. A more substantial way of putting the matter is that each joint contractor has a right to have his co-contractors joined as parties so as to have them all before the court*.'

[11] The facts in *Asia Commercial Finance (M) Bhd* also reveal that the plaintiff in that case obtained final judgment against defendants Nos 1, 3 and subsequently defendant No 4; the plaintiff having granted a loan to the first defendant with the second, third and fourth defendant being guarantees. The second defendant made an application for an order that the suit against him be dismissed or struck out with costs. It is pertinent to note that *Hammond v Schofield* and *Hoare v Niblett* were also premised on one action being taken against a joint contractor and after having obtained judgment against one a second subsequent action was instituted against the second.

[12] It is evident that the facts in those cases are clearly distinguishable from the facts in the present appeal in that in all those three cases one action followed another. *Parr v Snell* should not be glossed over resulting in a 'technical rule' being applied indiscriminately and *Asia Commercial Finance (M) Bhd* should not be expanded beyond the facts of the case. In this appeal final judgment was obtained against both the appellant and Cosmopac in the one and same action pursuant to O 14 of the Rules of the High Court 1980 and remain uncontested. We do not see any merit in applying the 'technical rule' here. The first respondent now seeks a fruition of the judgment and the filing of the petitions for winding up constitutes a different cause of action based on a judgment debt. Since both the appellant and Cosmopac have not discharged the accrued liability under the same judgment the first respondent is not precluded from seeking recourse in a statutory mechanism provided under s 218(1)(e) of the Companies Act 1965. The alleged 'technical rule' does not warrant, in the circumstances of this case, the first respondent from being prejudiced from realising the judgment debt. However the action on the unsatisfied judgment against Cosmopac cannot operate as an extinguishment of the debt for as long as it remains unsatisfied (see also *Wegg*

Prosser v Evans [1895] 1 QB 108). There is also here no abuse of process for it is indeed proven that the appellant has not been able to establish that it is not unable to pay its debts.

[13] This appeal is accordingly dismissed with costs. The judgment of the High Court is affirmed. The deposit to the respondent to account of taxed costs. Learned counsel for the respondent informed this court verbally that another panel of the Court of Appeal has on 16 April 2007 granted a stay of the winding up order dated 25 January 2007. For this, respondent's counsel made an oral application for this order of stay be dissolved with costs. Since there was no objection from other counsels supporting this oral application and also from counsel for the appellant, we dissolved the order for stay dated 16 April 2007 with costs.

Appeal dismissed with costs.

Reported by K Nesan